IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
October 11, 2007 Session

LYNDA SMITH, INDIVIDUALLY AND AS THE CONSERVATOR FOR TERRY CROUCH v. STATE OF TENNESSEE

Appeal from the Tennessee Claims Commission
No. 20401375 Stephanie R. Reevers, Claims Commissioner

No. M2007-00282-COA-R3-CV - Filed February 5, 2008

In this personal injury case, plaintiff, the mother of a prison inmate, sued the State for damages her son is alleged to have sustained because of negligent medical care provided by the State resulting in the delayed diagnosis of his brain tumor. Plaintiff also sued the State for her son's injuries sustained as the result of falls he experienced while in the State's care and custody after surgery to remove his brain tumor. The plaintiff's case was tried before the Tennessee Claims Commission which ruled that the plaintiff failed to prove that an earlier diagnosis of her son's tumor would have produced a different outcome, but that her son did sustain injuries as a result of the State's negligent care after surgery and awarded damages in the amount of $15,000. Plaintiff appealed. Upon our finding that the evidence does not preponderate to the contrary, we affirm the judgment of the Commission.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Claims Commission Affirmed

SHARON G. LEE, J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, P.J., M.S., and FRANK G. CLEMENT, JR., J., joined.

David Randolph Smith, Edmund J. Schmidt III, and Joseph H. Johnston; Nashville, Tennessee, for the appellant, Lynda Smith.

Robert E. Cooper, Jr., Attorney General & Reporter; Michael E. Moore, Solicitor General; Bradley W. Flippin, Assistant Attorney General, Nashville, Tennessee, for the appellee, State of Tennessee.

OPINION

I. Background

In 1987, Terry Crouch, then nineteen years of age, was convicted of first degree murder and began serving a life sentence in custody of the Tennessee Department of Correction (hereinafter "TDOC"). In 1997, Mr. Crouch was assigned to the Lois M. DeBerry Special Needs Facility (hereinafter "DSNF") in Nashville as an inmate worker. DSNF is operated by the TDOC and provides health care for TDOC inmates, and employs inmates to perform custodial work, kitchen work, and other support jobs.

On May 9, 2002, Mr. Crouch appeared at sick call complaining of nausea and a burning sensation in his stomach. He was examined by DSNF employee Fred Takacs, a board certified physician's assistant, who diagnosed him as suffering from gastroesophageal reflux disease (GERD) and prescribed him Tums and Zantac, an anti-ulcer medication. At the time of this consultation, Mr. Crouch's weight was recorded as 215 pounds. Mr. Crouch was instructed to return in five days if he was not feeling better.

Mr. Crouch next returned to sick call on July 11, 2002, and reported that he was feeling well, that his stomach problems had resolved, and that he was eating well and working on the yard every day. His recorded weight at this time was 191 pounds.

On September 24, 2002, Mr. Crouch reported to sick call complaining of nausea, vomiting, and frontal headache, which had started the day before. Mr. Crouch was seen by both Mr. Takacs and Dr. Keith Ivens[1], who was employed as medical director of DSNF and was Mr. Takacs's supervising physician. At this time, Mr. Crouch's recorded weight was 172 pounds. Mr. Takacs ordered lab work, and a chest x-ray was conducted but did not indicate any abnormalities. The next day, Mr. Crouch reported that his nausea was less frequent and that his headaches were a little better. However, five days later Mr. Crouch reappeared at sick call complaining of nausea and "stomach boiling." An upper gastrointestinal test, an HIV test, and additional blood work were ordered, and the results were all normal.

On October 4, 2002, Mr. Crouch indicated that his nausea and vomiting had resolved with the Zantac and that his appetite had improved. In notes recorded by Mr. Takacs on this occasion, Mr. Tacacs speculated that Mr. Crouch's symptoms were probably the result of "pre-parole stress" and after a discussion between Mr. Takacs and Dr. Ivens, the latter made notes indicating that Mr. Crouch's symptoms might be due to "psycho social issues." Mr. Takacs ordered a stool sample test and a urine dipstick test, neither of which indicated any abnormalities. On October 16, 2002, Mr. Takacs advised Mr. Crouch that the results of his upper gastrointestinal test, which were returned on October 9, 2002, were normal and noted that Mr. Crouch's stomach pains remained resolved with

[1]At the time, Dr. Ivens was an employee of Correctional Medical Services which, pursuant to a contract with TDOC, supplied DSNF with physicians to serve, inter alia, as primary care providers and medical directors at DSNF and other facilities housing inmates in custody of TDOC.

the Zantac. Mr. Crouch's weight on this date was recorded as 167 pounds.

DSNF Nurse Administrator Patricia Walker requested that another DSNF physician, Dr. Charles Alston, examine Mr. Crouch. Accordingly, Dr. Alston examined Mr. Crouch on October 25, 2002, and noted:

> Mr. Crouch's main complaint is stomach burning since May of 2002. Patient has also lost 50 pounds since May of 2002. Patient states that he has been unable to eat correctly. Lately since he was placed on Zantac, he has been able to eat better. Patient was having episodes of vomiting after eating.

After this examination, Dr. Alston ordered that Mr. Crouch undergo further blood tests, the results of which were found to be within a normal range. Dr. Alston also ordered that a barium enema be scheduled for Mr. Crouch. Mr. Crouch's weight at this time had increased to 172 pounds.

On October 30, 2002, Mr. Crouch underwent an additional chest x-ray which showed no abnormalities, and on November 1, 2002, he returned a stool guaiac card which was negative for occult blood.

On December 9, 2002, at Mr. Crouch's request, the barium enema scheduled by Dr. Alston was postponed until January 8, 2003, because of the holidays. When this test was administered on the latter date it showed no abnormalities. Mr. Takacs's notes show that Mr. Crouch's weight had increased to 175 pounds at this time and that the Zantac was "working well," with Mr. Crouch reporting that his symptoms were resolved and requesting a refill of his prescription for that medication.

In accord with the previously noted assessments of Dr. Ivens and Mr. Takacs indicating that Mr. Crouch's symptoms might have a psychological explanation, Mr. Crouch underwent a psychological evaluation by clinical psychologist Sarah Miller, Ph.D., on January 31, 2003, and February 7, 2003. During the course of this evaluation, Mr. Crouch advised Dr. Miller that he had been experiencing blurred vision for several months, although he had not reported this to anyone on the medical staff. Dr. Miller's evaluation notes from the January 31, 2003, session indicate that Mr. Crouch did not exhibit symptoms of depression or anorexia, and her notes from the session of February 7, 2003 indicate that Mr. Crouch will inform the medical staff of his blurred vision, that Dr. Miller will discuss Mr. Crouch's case with Mr. Takacs, and that she will see Mr. Crouch the next week for a follow-up.

Dr. Ivens saw Mr. Crouch again on February 11, 2003. Dr. Ivens notes state that he is seeing Mr. Crouch on this occasion based on multiple complaints of patient's mother, Lynda Smith. Dr. Ivens's notes further state that Mr. Crouch reports that his headaches have diminished, that his weight has increased, that he has no nausea, vomiting, or stomach pain, and that he has no complaints with his medical care.

On February 13, 2003, Mr. Crouch was seen by Mr. Takacs whose notes show that Mr. Crouch indicates that he needs new glasses, that his last eye exam was June of 2001, and that he is having headaches that he attributes to poor vision. Mr. Takacs ordered that Mr. Crouch be referred to optometry. A few days later, on February 18, 2003, Mr. Crouch again presented to sick call complaining of frontal headaches that he attributed to poor vision and a need for glasses and notes indicate that the optometry consultation is pending.

For some time, Lynda Smith had complained to DSNF medical staff and officials regarding her son's recurring symptoms and the absence of an explanatory diagnosis. On February 18, 2003, DSNF Nurse Administrator Patricia Walker arranged a meeting among herself, Ms. Smith, Mr. Crouch, Dr. Ivens, and Mr. Takacs. Ms. Walker testified that "the purpose of this meeting was to allow Ms. Smith to speak firsthand with the medical providers, and to come to some agreement in terms of understanding the treatment modalities, and what had been done, and then what was planned for the future." At this meeting, Ms. Smith spoke of her concern over her son's health and described his symptoms to include head twitches, nausea, blurred vision, continuing headaches, repeating himself, and pale color. Ms. Smith voiced her suspicion that Mr. Crouch might have a brain tumor and requested that a brain scan be performed; however, Dr. Ivens did not agree that such was warranted. Ms. Walker testified that she did observe that Mr. Crouch appeared pale, but that he did not demonstrate any other of the symptoms described by Ms. Smith.

Mr. Crouch's appointment with the optometrist originally scheduled for March 4, 2003, was rescheduled to April 15, 2003.

On March 12, 2003, Dr. Miller issued her conclusions from Mr. Crouch's psychological evaluation, stating therein as follows:

> Mr. Crouch has lost approximately sixty pounds and medical personnel expressed concern regarding his recent weight loss; however Mr. Crouch did not express personal concern over his weight. He indicated that he initially was concerned but stated that he has stopped losing weight and is currently maintaining. Mr. Crouch reported that in May of 2002, he became sick and started vomiting. He indicated that the vomiting along with a loss of appetite continued for approximately one month. Mr. Crouch stated he has since regained his appetite and consumes three meals a day through either meal trays and/or the commissary. Although Mr. Crouch indicated that he has begun eating again, he did not believe he has gained weight, only maintained at 170 pounds. Mr. Crouch did not demonstrate interest or concern in determining the cause of his rapid weight change and stated that he is just pleased he is no longer nauseated.

Dr. Miller concluded that Mr. Crouch did not exhibit a clinical impairment that warranted

psychological intervention.

Ms. Smith testified that she continued to visit her son weekly after the meeting of February 25, 2003, and that during the following weeks he lost weight, and at times, their visits were cut short because he did not feel well.

At the request of Dr. Ivens, Mr. Crouch was seen by Dr. Alston for reevaluation on April 7, 2003. Dr. Alston attested that at the time of this examination, Mr. Crouch was ambulatory, awake, alert and oriented to time, place, and person. "[M]aybe he was a little less talkative than the first time that I saw him. But that's about it." Dr. Alston ordered a repeat of lab tests for HIV and recommended a CT scan of Mr. Crouch's head. The CT scan was performed on April 14, 2003, and revealed a large tumor above the pituitary gland in Mr. Crouch's brain.

After discovery of the tumor, Mr. Crouch was referred to neurosurgeon Dr. Arthur Cushman for further evaluation and treatment. Dr. Cushman saw Mr. Crouch at some time before the end of April 2003 and diagnosed the tumor as a craniopharyngioma, which is a slow growing noncancerous tumor. Dr. Cushman determined that the tumor had obstructed the spinal fluid pathways in Mr. Crouch's brain, causing hydrocephalus, and had destroyed the functioning of Mr. Crouch's pituitary gland, causing hypopituitarism. Dr. Cushman noted that at the time of this initial examination, Mr. Crouch "looked . . . like someone with terminal AIDS or cancer . . . He was extremely thin, emaciated. He could barely see, really didn't seem to be very aware of what was going on."

Dr. Cushman began immediate hormone replacement therapy to alleviate Mr. Crouch's symptoms and strengthen him for surgery and then, on April 18, 2003, Dr. Cushman inserted a shunt in Mr. Crouch's head to relieve pressure caused by the hydrocephalus. These measures resulted in improvement of Mr. Crouch's condition, and surgery to resect the tumor was performed on July 18, 2003.

Dr. Cushman attested that he was not able to remove all of the tumor because it was "very adherent" to some of Mr. Crouch's brain structures, including the hypothalamus and optic nerve, that this resulted in residual hydrocephalism, and that Mr. Crouch will have to have permanent shunts to relieve the consequential pressure on his brain. Dr. Cushman testified that the pressure of the hydrocephalus and the surgery traumatized brain tissue around the hypothalamus and that some brain cells in that area may have died or may be functioning improperly. Dr. Cushman also testified that the resection damaged Mr. Crouch's optic nerve and hypothalamus. Dr. Cushman further testified that Mr. Crouch's pituitary stalk was obliterated as a result of the resection, and that he will have to be on hormone replacement all of his life. In Dr. Cushman's words, Mr. Crouch also had a "very stormy post-operative course with problems with blood pressure and this and that." After the resection, Mr. Crouch's shunt failed to perform properly, necessitating the insertion of an additional shunt on January 25, 2005. Finally, while being cared for at DSNF as a postoperative patient, Mr. Crouch suffered six falls between the time of his return to that facility on September 12, 2003, and October 5, 2003.

On October 15, 2003, Mr. Crouch was released from the custody of TDOC on medical furlough. For six weeks, he was in the care of his mother and when that proved nonfeasible, he was transferred to the Bordeaux Long Term Care Facility where he remained at the time of trial. Dr. Cushman testified that Mr. Crouch is now permanently disabled both mentally and physically. In this regard, he attested that, although Mr. Crouch is now alert and is able to walk from his wheelchair without help or support, he has "significant visual impairment" and is "essentially blind in his right eye," "his memory is impaired," and he has "significant dementia" and "requires help with his activities of daily living with walking around, things like that. He also isn't able to really make any decisions on his own about any type of care that he needs."

By complaint filed in the Tennessee Claims Commission, Middle Section, ("the Commission") on February 26, 2004, as amended by complaint filed December 1, 2005, Lynda Smith sued the State of Tennessee for damages on behalf of herself and Mr. Crouch. Inter alia, Ms. Smith charged that the DSNF medical staff breached the applicable medical standard of care in their treatment of Mr. Crouch and in their failure to timely diagnosis his brain tumor and that "[b]y the time the tumor was finally diagnosed and Terry Crouch received treatment, the tumor had grown in such size that the treatment could not be accomplished without causing Terry Crouch to suffer permanent and adverse consequences." Ms. Smith also charged that the State was negligent in allowing Dr. Ivens to serve as medical director and primary care physician at DSNF because he did not meet requirements under the contract between TDOC and Correctional Medical Services. And additionally, Ms. Smith charged that the DSNF medical staff, including the nursing staff, were negligent in their care of Mr. Crouch after his surgery and specifically, in failing to "provide . . . the means to prevent him from falling . . . in view of his physical and mental incapacities . . . [and that] this negligence possibly compromis[ed] Terry Crouch's recovery from brain surgery."

The case was tried on February 21-23, 2006. Inter alia, the Commission ruled that "given the nature of Mr. Crouch's illness and the likelihood that disability would have resulted in any event," it could not conclude from the evidence presented "that Mr. Crouch's injuries resulted from any delay in the discovery of his tumor occasioned by the negligence of State employees." The Commission further ruled that the State was not responsible for any alleged negligent acts of Dr. Ivens in that he was not a state employee at the time. However, the Commission determined that the post-surgery failure to implement sufficient fall precautions and to supervise Mr. Crouch was a breach of the standard of nursing care and "proximately resulted in injuries consisting of various bruises, cuts, and lacerations" for which the Commission awarded a judgment for damages in the amount of $15,000. Ms. Smith appeals.

II. Issues

We address two issues in this case:

1) Whether the evidence preponderates against the Commission's ruling that Mr. Crouch's injuries would not have been avoided by an earlier diagnosis of his brain tumor.

2) Whether the Commission's award of $15,000 for injuries sustained by Mr. Crouch as a result of falls he experienced during his post-operative care was adequate.

III. Analysis

A. Standard of Review

As provided at Tenn. Code Ann. § 9-8-403(a)(1), the Commission's judgment is subject to the same standard of review applicable to final judgments in trial court civil actions. Pursuant to that standard, in a non-jury case such as this one, we review the record de novo with a presumption of correctness as to the trial court's determination of facts, and we must honor those findings unless the evidence preponderates to the contrary. Tenn. R. App. P. 13(d); ***Union Carbide v. Huddleston,*** 854 S.W.2d 87, 91 (Tenn. 1993). When a trial court has seen and heard witnesses, especially where issues of credibility and weight of oral testimony are involved, considerable deference must be accorded to the trial court's factual findings. ***Seals v. England/Corsair Upholstery Mfg. Co., Inc.,*** 984 S.W.2d 912, 915 (Tenn. 1999). The trial court's conclusions of law are reviewed de novo and are accorded no presumption of correctness. ***Campbell v. Florida Steel Corp.,*** 919 S.W.2d 26, 35 (Tenn. 1996); ***Presley v. Bennett,*** 860 S.W.2d 857, 859 (Tenn. 1993).

B. Causation

An essential requirement that a plaintiff must meet in prosecuting a negligence action is proof of causation. "It is well settled in Tennessee that 'proof of negligence without proof of causation is nothing.'" ***Mosley v. Metropolitan Gov. of Nashville***, 155 S.W.3d 119, 124 (Tenn. Ct. App. 2004), (*citing* ***German v. Nichopoulos***, 577 S.W.2d 197, 203 (Tenn. Ct. App. 1978); ***Drewry v. County of Obion***, 619 S.W.2d 397, 398 (Tenn. Ct. App. 1981)). Additionally, Tenn. Code Ann. § 29-26-115(a)(3) specifically provides that in a medical malpractice action, the plaintiff bears the burden of proving that "[a]s a proximate result of the defendant's negligent act or omission, the plaintiff suffered injuries which would not otherwise have occurred." Further, as the Tennessee Supreme Court has recognized, proof to the degree of mere possibility will not suffice:

> [P]roof of causation equating to a "possibility," a "might have," "may have," "could have," is not sufficient, as a matter of law to establish the required nexus between the plaintiff's injury and the defendant's tortious conduct by a preponderance of the evidence in a medical malpractice case. Causation in fact is a matter of probability, not possibility, and in a medical malpractice case, such must be shown to a reasonable degree of medical certainty.

Kilpatrick v. Bryant, 868 S.W.2d 594, 602 (Tenn. 1993), (*citing* ***White v. Methodist Hosp. South***, 844 S.W.2d 642, 648-49 (Tenn. Ct. App. 1992)).

Given these requirements, we believe that it would be premature in this case to address any arguments that the defendant was negligent in the diagnosis and treatment of Mr. Crouch until we

have first determined whether the evidence before the Commission was sufficient to establish the element of causation to a reasonable degree of medical certainty.

In her complaint, Ms. Smith asserts that medical intervention addressing Mr. Crouch's tumor should have occurred no later than the end of February 2003, at which time the previously noted meeting took place between herself, Mr. Crouch, Dr. Ivens, Mr. Takacs, and Ms. Walker. Adopting that date, it was incumbent upon Ms. Smith to prove to a reasonable degree of medical certainty that, had Mr. Crouch been properly diagnosed at that time, approximately two months prior to the time that his brain tumor was actually discovered in April of 2003, he would not have suffered those same injuries for which he seeks compensation.

The sole proof presented by Ms. Smith regarding causation consisted of the testimony of Dr. Cushman who was deposed on three occasions - June 10, 2005; September 23, 2005; and February 17, 2006. Upon our review of these depositions, we find Dr. Cushman's testimony to be either contradictory or of insufficient certainty to establish causation. And therefore, while recognizing the tragic circumstances of this case, we are compelled to conclude that the evidence does not preponderate against the ruling of the Commission that Ms. Smith failed to establish causation.

In support of her argument that the evidence preponderates in favor of a finding that diagnosis of Mr. Crouch's condition two months earlier would have resulted in a different outcome, Ms. Smith cites the following February 17, 2006 testimony of Dr. Cushman in response to a hypothetical question based upon Mr. Crouch's asserted condition in late February of 2003:

> Q. Dr. Cushman, I want you to assume the following facts are true. That on February 25, 2003, Terry Crouch had the following physical and mental capabilities: First, he was able to stand and walk without assistance; secondly, he was able to engage in a conversation with another person; three, he was able to make decisions and perform every day activities; four, he was able to independently dress himself, bathe himself and feed himself; and five, he was able to work a job that required him to organize, issue and account for recreational equipment.
>
> Given these facts, do you have an opinion, within a reasonable degree of medical certainty, as to Mr. Crouch's recovery, had his brain tumor been diagnosed and treated at that time?
>
> A. Yes, in my opinion in somebody - - if a tumor is diagnosed and treated at a time when they're having relatively few symptoms, the prognosis was much better.

Dr. Cushman further testified on this occasion that a patient's deficits following surgery to remove a brain tumor correspond to the magnitude of the symptoms he was suffering from at the

time of treatment. He attested that the growth of Mr. Crouch's tumor had resulted in hydrocephalus, which in turn had caused his brain to lose its capacity for autoregulation or ability to control normal blood flow, and that the loss of autoregulation "causes a very serious problem with recovery after the surgery, changes in blood pressure, temperature and so forth." Dr. Cushman attested that if, in late February of 2003, Mr. Crouch possessed the abilities described in the above cited hypothetical, then Mr. Crouch's brain had not yet lost its autoregulation capacity. In support of her argument that Mr. Crouch "would have been without some of the mental and physical deficits and disabilities from which [he] currently suffers, that his chances for developing post-operative complications would have been significantly reduced, and that he would have been able to live independently and work a job," Ms. Smith references the following testimony of Dr. Cushman:

> Q. Had [Mr. Crouch] been diagnosed and treated before he lost autoregulation, would his recovery have been without some of the mental and physical deficits that he currently suffers from?
>
> A. I don't know. Even if all the conditions are perfect, bad outcomes can occur with the surgery, particularly for this type of thing. However, I think his chances of recovery and his chance of not having post-operative problems would have been significantly reduced.
>
> Q. Can you state that within terms of more likely than not?
>
> A. Certainly.
>
> Q. In terms of more likely than not, had Mr. Crouch been diagnosed and treated before he suffered a loss of autoregulation, would he have had a recovery that would have allowed him to live independently?
>
> A. Again, that's speculation based on what I said before, but would be more likely than not. It would certainly be more likely than not. It would certainly be more likely that he would do well at that point than at the point that I saw him.
>
> Q. But in terms of more likely than not, would he be able to live independently?
>
> A. Yes.
>
> Q. And in terms of more likely than not, had you diagnosed and treated Mr. Crouch before he had a loss of autoregulation, would he have been able to work some type of job?

A. My answer would be the same.

Ms. Smith also relies on other testimony of Dr. Cushman from this date to the effect that the "five or six" other patients he had treated for crainopharyngioma during his thirty years of practice "did much better because they were diagnosed relatively early." When asked "[w]hat complicated or made Terry Crouch's recovery worse?," Dr. Cushman replied as follows:

> Well, the factors that made it worse were that the tumor was extremely large. It had caused severe hydrocephalus. It caused damage to the frontal lobe of the brain. It caused damage - - essentially complete destruction of pituitary function, blindness, and problems with the hypothalamus.

Dr. Cushman testified that although several of his other craniopharyngioma patients had hydrocephalus, visual problems, and problems with pituitary function, they had not advanced to the point Mr. Crouch had, and they experienced recovery that allowed them to have lifestyles relatively deficit free, to live independently, and to return to some type of work.

First, with respect to Dr. Cushman's response to the hypothetical question based upon Mr. Crouch's asserted condition at the end of February 2003, we do not agree that his rather general response indicating that the prognosis would have been "much better" if Mr. Crouch's tumor had been diagnosed and treated at that time suffices to prove that Mr. Crouch would not still have suffered at least some of the same injuries. Additionally, the cited testimony of Dr. Cushman regarding the consequences of diagnosing and treating Mr. Crouch after loss of autoregulation is equivocal. On one hand, Dr. Cushman states that, more likely than not, Mr. Crouch would have been able to live independently, and it "would be more likely that he would do well" had he been diagnosed and treated before loss of autoregulation. On the other hand, Dr. Cushman states that he does not know if diagnosis and treatment before loss of autoregulation would have eliminated some of the mental and physical deficits suffered by Mr. Crouch, and that even under perfect conditions bad outcomes can occur with surgery. Further, Dr. Cushman indicates that his opinion is speculative as to whether Mr. Crouch would have been able to live independently had he received diagnosis and treatment before loss of autoregulation, and as this Court has noted, speculative testimony is not sufficient to establish causation. ***Miller v. Choo Choo Partners, L.P.***, 73 S.W.3d 897, 901 (Tenn. Ct. App. 2001). Finally, while Dr. Cushman testified at this deposition that the other craniopharyngioma patients he had treated during the course of his career did better because they were diagnosed "relatively early," this assertion does not of itself prove that a two month delay in the diagnosis and treatment of any of these patients would have compromised their recovery. And we also note that when asked what factors made Mr. Crouch's recovery worse relative to these other patients, Dr. Cushman included the fact that the tumor was "extremely large." However, when deposed on June 10, 2005, Dr. Cushman testified that the tumor of one of his other craniopharyngioma patients was larger than Mr. Crouch's.

Even disregarding all of these shortcomings and accepting Dr. Cushman's testimony of

February 17, 2006, as urged by Ms. Smith, we are yet confronted with the additional fact that this testimony is in direct conflict with testimony given by Dr. Cushman at his two previous depositions. Contrary to his statement that, to a reasonable degree of medical certainty, diagnosis and treatment of the tumor two months earlier would have prevented the consequences suffered, on June 10, 2005, Dr. Cushman attested as follows:

> Q. Can you point to a specific fact that supports your conclusion that if a diagnosis had been made two months earlier that Mr. Crouch's outcome would have been different?
>
> A. I can't say for sure that it would.
>
> Q. Okay. If a diagnosis had been made, let's again say two months earlier, you don't think your treatment would have been any different, do you?
>
> A. No.
>
> Q. Okay. If a diagnosis had been made a year earlier, your treatment wouldn't have been any different, would it?
>
> A. Probably not.

Similarly, and perhaps even more definitively, on September 23, 2005, Dr. Cushman gave the following additional testimony with specific regard to Mr. Crouch's hydrocephalus, which Dr. Cushman stated was "a significant part of the problem" with respect to Mr. Crouch's permanent brain damage:

> Q. Could you have taken any kind of steps six months earlier to relieve the development of cerebral spinal fluid in his brain? And that's what we're talking about with hydrocephalus?
>
> A. If I had seen him, and he had significant hydrocephalus, I could have performed a shunt at that time.
>
> Q. And would that shunt have been permanent if it would have been six months before?
>
> A. Almost certainly.
>
> Q. Can you tell me, to a reasonable degree of medical certainty, whether his outcome would have been different if you had diagnosed it two months earlier?

> A. I don't know, but I can't - - I can't answer that, except I don't think it would have made - - I don't think it would have made much difference.

As the Supreme Court of this state has pronounced, "[c]ontradictory statements of a witness in connection with the same fact have a result of cancelling out each other." ***Tibbals Flooring Co. v. Stanfill***, 410 S.W.2d 892, 896 (Tenn. 1967); *see also* ***Price v. Becker***, 812 S.W.2d 597, 598 (Tenn. Ct. App. 1991) ("Two sworn inconsistent statements by a party are of no probative value in establishing a disputed issue of material fact.").

Furthermore, we are compelled to note Dr. Cushman's testimony on June 10, 2005, that his treatment of Mr. Crouch's condition would have been the same even had the tumor been diagnosed two to six months earlier in the context of Dr. Cushman's additional testimony as follows:

> Q. Okay. So his confusion, then, in your opinion, results from a combination of the craniopharyngioma itself, the resultant hydrocephalus, and the trauma of the surgical procedures?
>
> A. Yes.
>
> Q. All three of those things?
>
> A. Yes.
>
> Q. Okay. Is his labile emotional control also as a result of the same three facts or - -
>
> A. Yes.
>
> Q. Is the fact that he can't walk also a result of those same three factors?
>
> A. Yes.
>
> Q. Paragraph five[2] says that as a result of the condition for which you are treating Mr. Crouch, in your opinion he's permanently disabled. By "permanently disabled" do you mean permanently unable to participate in the workforce?
>
> A. Correct.

[2]Refers to a paragraph in a February 22, 2005 letter prepared by Dr. Cushman in response to questions regarding opinion testimony he might offer at trial.

Q. Okay.

A. And beyond that. Also, I discussed that I think he's going to be dependent on the care of others.

Q. Okay. And that condition also, then, is a result of those three factors: [t]he craniopharyngioma, the hydrocephalus, and the surgery?

A. Yes.

Q. Okay. And the fact that in your opinion he'll be permanently dependent on others for assistance in his everyday needs, that also is attributable to those same three factors, correct?

A. Yes.

Q. When you get right down to the bottom line, Mr. Crouch's present condition, both emotionally and physically, is a result of a combination of all three of those factors, right?

A. Yes.

Q. In other words, his present condition is a result of the tumor itself; the hydrocephalus, which resulted from the tumor; and the surgery, which was necessitated by the tumor?

A. Yes.

Q. And there's no way to attribute among those three causative factors which one contributed how much, correct?

A. I don't - - correct.

Even if it were conceded that Mr. Crouch's symptoms were worse at the time of diagnosis than they were two months earlier, given the above testimony, it is unclear what difference a diagnosis of the tumor at that time would have made. In other words, if the same treatment, including surgery, would have been implemented even had the tumor been discovered two months earlier, and the surgery itself was a contributing factor to Mr. Crouch's present condition to an unknown degree, it appears that it would not be possible to determine to what degree Mr. Crouch's present condition would have been changed by an earlier diagnosis.

For all of the reasons stated above, we are compelled to conclude that the evidence does not preponderate against the conclusion that a correct diagnosis of Mr. Crouch's brain tumor in February

of 2003 would not have resulted in avoidance of the injuries for which he seeks compensation.

C. Adequacy of Compensation

Ms. Smith also contends that the Commission failed to award adequate compensation for injuries sustained by Mr. Crouch due to falls he experienced while he was receiving postsurgical care at DSNF.

As previously noted, the Commission determined that DSNF nursing staff breached the standard of care in their supervision of Mr. Crouch and in their failure to implement sufficient fall precautions. The Commission further ruled as follows:

> This breach proximately resulted in injuries consisting of various bruises, cuts, and lacerations, for which Mr. Crouch is entitled to damages for pain and suffering. The proof did not demonstrate, however, that Mr. Crouch sustained injuries of a permanent nature as a result of his falls.

Based upon these findings, the Commission awarded damages in the amount of $15,000. On appeal, Ms. Smith argues that this award was inadequate and urges that the award be increased to $50,000.

In support of this argument, Ms. Smith references testimony of Dr. Cushman that Mr. Crouch's falls "caused some exacerbation of his symptoms." However, as Ms. Smith concedes, the falls did not permanently exacerbate her son's condition, and she directs us to no proof showing that any of the injuries he suffered were not adequately compensated for by the amount awarded or justifying an award in the suggested amount of $50,000. Accordingly, we are compelled to approve the decision of the Commission in this regard.

We acknowledge that Ms. Smith has raised issues in addition to those addressed; however, it is our determination that all of these additional issues are pretermitted by our decision herein.

IV. Conclusion

For the foregoing reasons, the judgment of the Commission is affirmed. Costs of appeal are assessed to the appellant, Lynda Smith.

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SHARON G. LEE, JUDGE